

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

7 INTERNATIONAL MILLENIUM MINING )  
7 CORP., a corporation, )  
8 Plaintiff, )  
9 vs. )  
10 PAUL MCMAHON, EXECUTOR OF THE )  
ESTATE OF NADEAN YOVONNE BEDFORD, )  
11 aka NADEAN YVONNE BEDFORD, )  
aka NADEAN Y. BEDFORD; KIMI DIAZ, )  
12 an individual; DOES 1-5; and BLACK )  
CORPORATIONS 1-5, )  
13 Defendants. )  
14 \_\_\_\_\_ )  
15 KIMI DIAZ, )  
16 Cross/Counter-Plaintiff )  
17 vs. )  
18 INTERNATIONAL MILLENIUM MINING )  
CORP., a corporation; PAUL MCMAHON, )  
19 EXECUTOR OF THE ESTATE OF NADEAN )  
YOVONNE BEDFORD, aka NADEAN YVONNE )  
20 BEDFORD, aka NADEAN Y. BEDFORD; )  
DOES 1-5; and BLACK CORPORATIONS )  
21 1-5, )  
22 Cross/Counter-Defendants. )  
23 \_\_\_\_\_ )  
24 ESTATE OF BEDFORD, )  
25 Cross-Plaintiff, )  
26 vs. )  
27 KIMI DIAZ, )  
28 Cross-Defendant. )

**Order**

1 Now pending is the "Motion to Dismiss and for Sanctions" (#20)  
2 filed by Defendant Kimi Diaz ("Diaz"). Diaz seeks dismissal of the  
3 various claims asserted against her by Plaintiff International  
4 Millenium Mining Corp. ("IMMC"), as well as the cross-claim for  
5 indemnity asserted by Defendant Paul McMahon, Executor of the Estate  
6 of Nadean Yovonne Bedford, aka Nadean Yvonne Bedford, aka Nadean Y.  
7 Bedford ("the Estate"). Diaz has withdrawn her motion for sanctions  
8 pursuant to Fed. R. Civ. P. 11, conceding that she failed to comply  
9 with the requirements of Rule 11(c)(2). She requests, however, that  
10 sanctions be imposed "on the Court's own initiative" or based on  
11 Diaz's counterclaims for abuse of process and malicious prosecution.  
12 (Reply at 6-7 (#25).)

13 For the reasons stated below, Diaz's motion (#20) will be  
14 granted in part and denied in part.

15

16 **I. Background**

17 This suit was brought by IMMC to protect its interests in  
18 certain mining claims located in Mineral County, Nevada. (Complaint  
19 ¶ 7 (#1).) These mining claims were owned by Nadean Bedford and are  
20 now owned by her Estate. (Id. ¶ 8.) Diaz is one of the  
21 beneficiaries of the Estate. (Id. ¶ 9.) On December 15, 2004, IMMC  
22 entered into a contract with Bedford that gave IMMC an exclusive  
23 option to purchase the mining claims for \$900,000.00, payable on a  
24 schedule of \$3000.00 per month. (Id. ¶ 12.) IMMC alleges that  
25 Defendants – generally without specifying which of the Defendants –  
26 have engaged in conduct that has interfered with IMMC's contractual  
27 rights. In particular, IMMC alleges that Defendants have attempted

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1 to sell or otherwise transfer or encumber the mining claims to third  
2 parties in violation of IMMC's contractual right to an exclusive  
3 option to purchase the mining claims. (Id. ¶ 13.) Further,  
4 Defendants have allegedly made false statements to third parties  
5 regarding the Estate's rights in the mining claims, failing to  
6 disclose the contract with IMMC to those third parties. (Id. ¶¶ 17-  
7 19.)

8 IMMC's complaint (#1) was filed on January 16, 2008. The  
9 complaint asserts ten claims for relief: (1) breach of contract; (2)  
10 fraud; (3) negligence; (4) misrepresentation; (5) breach of the  
11 covenant of good faith and fair dealing; (6) deceptive trade  
12 practice; (7) racketeering; (8) interference with contracts; (9)  
13 interference with prospective economic advantages; and (10)  
14 conspiracy. The Estate filed its answer and crossclaim (#4) on  
15 April 7, 2008. The Estate alleges that if IMMC suffered any  
16 damages, it is because of actions taken by Diaz; the Estate asserts  
17 a right to complete indemnity on that basis. (Answer ¶ 100 (#4).)  
18 On May 15, 2008, Diaz answered (#8) IMMC's complaint (#1), asserting  
19 a crossclaim for indemnity against the Estate and counterclaims for  
20 malicious prosecution and abuse of process against IMMC.

21 Diaz's motion to dismiss (#20), filed on September 19, 2008,  
22 seeks dismissal of IMMC's complaint and the Estate's crossclaim  
23 pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). IMMC opposed  
24 (#21) the motion and Diaz replied (#25).

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## II. Subject Matter Jurisdiction

2 Diaz asserts that the Court does not have subject matter  
3 jurisdiction. Though she makes several arguments, we need only  
4 address those relating to diversity jurisdiction, and in particular  
5 the amount in controversy requirement. For the reasons stated  
6 below, we conclude that we have subject matter jurisdiction.

#### A. Standard

8       The plaintiff bears the burden of establishing that this Court  
9 has personal and subject matter jurisdiction over the defendant.  
10 See Mattel, Inc. v. Greiner & Hausser GmbH, 354 F.3d 857, 862 (9th  
11 Cir. 2003). A motion to dismiss for lack of jurisdiction may attack  
12 the sufficiency of the complaint, or it may be made as a "speaking  
13 motion" attacking the existence of jurisdiction as a matter of fact.  
14 Thornhill Publ'q. Co., Inc. v. Gen. Tel. & Elecs. Corp., 594 F.2d  
15 730, 733 (9th Cir. 1979). Here, Diaz has launched a facial attack  
16 on the sufficiency of the complaint because she does not present any  
17 affidavits or other evidence. See Safe Air for Everyone v. Meyer,  
18 373 F.3d 1035, 1039 (9th Cir. 2004); Savage v. Glendale Union High  
19 School, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

20 The non-moving party "need only make a *prima facie* showing of  
21 jurisdiction to survive the motion to dismiss." Mattel, 354 F.3d at  
22 862. The non-moving party's version of any contested facts must be  
23 taken as true. Rhoades v. Avon Prods., Inc., 504 F.3d 1151, 1160  
24 (9th Cir. 2007). Where the amount in controversy is at issue, "[t]o  
25 justify dismissal, it must appear to a legal certainty that the  
26 claim is really for less than the jurisdictional amount." Crum v.  
27 Circus Circus Enters., 231 F.3d 1129, 1131 (9th Cir. 2000) (internal

1 quotation marks omitted). Thus, because the burden of proof to  
 2 establish jurisdiction lies with the plaintiff, IMCC must show that  
 3 it does not appear to a legal certainty that its claims are for less  
 4 than the required amount. United States v. S. Pac. Transp. Co., 543  
 5 F.2d 676, 682 (9th Cir. 1976).<sup>1</sup>

6 B. Analysis

7 Diaz argues that IMMC has failed to show that we have diversity  
 8 jurisdiction over this action. Under 28 U.S.C. § 1332, a district  
 9 court has jurisdiction when the matter in controversy exceeds  
 10 \$75,000 and the parties are in complete diversity. Diaz does not  
 11 challenge the diversity of the parties' citizenship, and it appears  
 12 from the face of the complaint that there is complete diversity.  
 13 Rather, Diaz argues that the amount in controversy is less than  
 14 \$75,000.

15 Generally, the sum claimed by the plaintiff in the pleadings  
 16 controls the amount in controversy inquiry, so long as the claim is  
 17 made in good faith. See Crum, 231 F.3d at 1131 (citing St. Paul  
 18 Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938)). Here,  
 19

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20 <sup>1</sup> It is worth noting that Diaz's understanding of the burden of  
 21 proof is apparently different, though her motion is not a model of  
 22 clarity in this regard. In any case, her argument is based on cases  
 23 where the action has been removed from state court, rather than filed  
 24 initially in federal court. (See Motion at 4 (#20) (citing Sanchez v.  
Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996).) In  
Sanchez and other such cases, the Ninth Circuit required the removing  
 25 defendants to prove the amount in controversy by a preponderance of  
 26 the evidence. See Sanchez, 102 F.3d at 404. So allocating the burden  
 27 of proof would be inappropriate in this case, which was not removed,  
 but rather filed originally in federal court. See Crum, 231 F.3d  
 1129, 1131 (applying legal certainty test); Gaus v. Miles, Inc., 980  
 F.2d 565, 566 (9th Cir. 1992) (noting that "[i]n diversity cases,  
 where the amount in controversy is in doubt, the Supreme Court has  
 drawn a sharp distinction between original and removal jurisdiction").

1 IMMC states in its prayer for relief that it seeks "general damages  
2 in a sum in excess of \$1,000,000 from each Defendant." (Complaint  
3 at 15 (#1).) Diaz, however, challenges whether this sum is claimed  
4 in good faith: "IMMC's assertion that the amount in controversy  
5 exceeds \$75,000.00, much less \$1 million, is ludicrous and was made  
6 in bad faith." (Motion at 4 (#20).)

7 Diaz has presented no evidence in support of her claim of bad  
8 faith. Nor does it appear from the face of IMMC's complaint that  
9 the claim is made in bad faith. Diaz concedes that she would have  
10 no right to do the things she is alleged to have attempted to do  
11 (such as sell the mining claims to third parties). (*Id.*) She  
12 asserts on that basis that she "could not . . . have been the cause  
13 of anything but very nominal damages, if any at all." (*Id.*) We do  
14 not see why this would necessarily be the case: the Complaint  
15 alleges that the defendants, including Diaz, interfered with IMMC's  
16 contractual rights by giving third parties the impression that the  
17 defendants had the right and authority to sell or otherwise alienate  
18 or encumber the mining claims. (Complaint ¶ 13 (#1).) On this  
19 basis, the third parties could well conclude there are at least  
20 questions about IMMC's rights to the mining claims and thereby  
21 refrain from doing business with IMMC with regard to the mining  
22 claims. It is plausible that IMMC could be substantially damaged  
23 thereby. Thus, we cannot conclude from the face of the Complaint  
24 that the claims are made in bad faith.

25 Further, even if we were to find that Plaintiff's claim for  
26 damages does not control in this case, the Complaint alleges (and  
27 Diaz has not disputed) that IMMC has been paying \$3000 per month

1 since December 2004 for the exclusive option to purchase the mining  
 2 claims, as well as the agreement of the defendants to refrain from  
 3 certain actions, including attempts to sell or otherwise alienate or  
 4 encumber the mining claims except in accordance with the agreement  
 5 with IMMC. (Complaint ¶¶ 12-14 (#1).) The Complaint alleges that  
 6 IMMC has not obtained the benefit of its bargain as a result of the  
 7 actions of the defendants, including Diaz. (*Id.* at ¶ 13, 15.) Even  
 8 if IMMC suffered no damages other than the fruitless payment of  
 9 \$3,000 per month since December 2004, the total payments made as of  
 10 the filing of the Complaint on January 16, 2008, substantially  
 11 exceed the jurisdictional amount of \$75,000.

12 We conclude that IMMC has met its burden of demonstrating that  
 13 it does not appear to a legal certainty that the amount in  
 14 controversy is less than the jurisdictional amount. As such, we  
 15 have subject matter jurisdiction over this case, and Diaz's motion  
 16 will be denied in that respect.

17

18 **III. Failure to Plead Fraud with Particularity**

19 **A. Standard**

20 Federal Rule of Civil Procedure 9(b) provides: "In alleging  
 21 fraud . . . a party must state with particularity the circumstances  
 22 constituting fraud . . . ." Rule 9(b) imposes this heightened  
 23 pleading requirement so that the fraud-action defendant "can prepare  
 24 an adequate answer from the allegations." *Odom v. Microsoft Corp.*,  
 25 486 F.3d 541, 553 (9th Cir. 2007) (internal quotation marks  
 26 omitted). Applying this particularity requirement, the Ninth  
 27 Circuit has held that a plaintiff must plead "times, dates, places"

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1 and other details. E.g., Semegen v. Weidner, 780 F.2d 727, 731 (9th  
2 Cir. 1985). "How much additional specificity is required depends on  
3 the nature of the individual case." Arroyo v. Wheat, 591 F. Supp.  
4 141, 144 (D. Nev. 1984).

5 B. Analysis

6 Diaz asserts that IMMC has failed to plead fraud with the  
7 particularity required under Rule 9(b). An examination of IMMC's  
8 complaint reveals that Diaz is correct. For the most part, IMMC  
9 makes allegations against "Defendants," rather than any particular  
10 one of the defendants. No "times, dates, places," or other details  
11 of the alleged fraud are alleged. See Semegen, 780 F.2d at 731. It  
12 is alleged that "Defendants knowingly and deceptively schemed and  
13 planned, on at least two (2) separate occasions, and were prepared  
14 to and did, in fact, make whatever representations were necessary to  
15 induce third parties to make offers and enter into at least one  
16 written agreement to acquire interests in the Property . . . ." (Complaint ¶ 19 (#1).) No details are alleged, however, regarding  
17 the content of alleged misrepresentations, who the third parties  
18 might be, the time, date, or place of the "two (2) separate  
19 occasions," and so on.

21 IMMC argues that the relaxed standard of pleading that applies  
22 when facts relevant to the fraud claims are peculiarly within the  
23 defendant's knowledge should be applied here. (P.'s Opp. at 10  
24 (#21).) It is apparent from IMMC's opposition, however, that there  
25 are a number of relevant facts that were not peculiarly within  
26 defendants' knowledge and yet were not pleaded. (Id. at 11-12.) Thus, even if some facts in this case may be peculiarly within the  
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1 defendants' knowledge, IMMC needs to plead with a great deal more  
2 particularity than it did.

3 We conclude that insofar as the Complaint (#1) alleges fraud,  
4 it does not comply with the particularity requirements of Rule 9(b).  
5 There is no reason to believe, however, that IMMC could not plead  
6 fraud with particularity, given leave to amend. See United States  
7 ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1052 (9th  
8 Cir. 2001) (noting that leave to amend should be granted unless the  
9 pleading could not possibly be cured by the allegation of other  
10 facts). Moreover, not all of IMMC's claims for relief are grounded  
11 in fraud. IMMC's first claim for relief, for example, is for breach  
12 of contract, which falls under the notice pleading requirements of  
13 Rule 8(a). Thus, leave to amend should be granted, and even if an  
14 amended complaint is not filed, the case would proceed on IMMC's  
15 claims for relief that are not grounded in fraud.

16

17 **IV. Conclusion**

18 We have diversity jurisdiction over this case because the  
19 parties' citizenship is completely diverse and the amount in  
20 controversy exceeds \$75,000. IMMC has, however, failed to plead its  
21 allegations of fraud with the degree of particularity required under  
22 Rule 9(b). Thus, IMMC must either amend its complaint with regard  
23 to its claims for relief that are grounded in fraud, or proceed  
24 without amendment on its other claims for relief that fall under the  
25 notice pleading standard of Rule 8(a).

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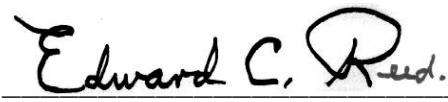
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1       **IT IS, THEREFORE, HEREBY ORDERED THAT** Plaintiff's Motion to  
2 Dismiss (#20) is **GRANTED IN PART and DENIED IN PART** as follows:  
3        Insofar as Diaz seeks dismissal pursuant to Fed. R. Civ. P.  
4 12(b) (1) for lack of subject matter jurisdiction, the motion is  
5 **DENIED**.

6        Insofar as Diaz seeks dismissal of IMMC's complaint for failure  
7 to plead claims grounded in fraud with particularity pursuant to  
8 Fed. R. Civ. P. 9(b), the motion is **GRANTED**. Plaintiff shall have  
9 twenty (20) days from the date of entry of this Order within which  
10 to file an amended complaint. If no amended complaint is filed  
11 within that period, IMMC's claims for relief that are grounded in  
12 fraud will be dismissed, and the case will proceed on IMMC's  
13 remaining claims.

14       Diaz's request for sanctions against IMMC is **DENIED**.

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17 DATED: July 15, 2009.

18         
19       UNITED STATES DISTRICT JUDGE

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